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Statement by Chief Commissioner, Jennifer Lynch, Q.C., before the Standing Committee on Aboriginal Affairs and Northern Development on Bill C-44, An Act to Amend the Canadian Human Rights Act

Speaking Notes
for an appearance by
Jennifer Lynch, Q.C.
Chief Commissioner
Canadian Human Rights Commission
as a witness before the
Standing Committee on Aboriginal Affairs
and Northern Development

on

Bill C-44:

An Act to Amend the *Canadian Human Rights Act*
June 7, 2007

Mr. Chairman, Members of the Committee, merci pour votre accueil.

Thank you for the opportunity to appear before you again as the Committee concludes its hearings on Bill C-44.

We at the Commission have followed the hearings carefully. We have listened, and we have learned. Today, before answering your questions, I would like to link the key points of our submission with the other testimony that you have heard. I will also provide an analysis of some misconceptions and concerns that have been raised by other witnesses, about the impact of repeal.

I. Linking our submission to others' testimony:

On April 19, we made four main points:

1. We support the expeditious repeal of Section 67;

2. We support the need to ensure that the *Canadian Human Rights Act* is interpreted in a manner that strikes an appropriate balance between individual rights and interests and collective rights and interests;
3. In our opinion, the transitional period should be much longer than 6 months, at a minimum 18 months;
4. Proper funding of the Commission and First Nations is crucial to ensure successful implementation of repeal.

Your witnesses have, I submit, confirmed the strong validity of these four key points.

1. Expeditious Repeal

Almost all the witnesses that appeared before the Committee supported the need for a system of human rights protection and redress for First Nations.

This is not surprising.

We continue to stress the urgency of repeal. The Commission has been calling for repeal for thirty years. Although the *Canadian Human Rights Act* has been amended several times in order to maintain the Commissions ability to protect and promote human rights, section 67 has remained in the Act.

Thirty years is far too long to wait for people to have access to basic human rights protection that other Canadians take for granted. The time to act is now.

Clearly, the issue is not **whether** there should be the fullest human rights protection for First Nations but **how** best to implement such protection.

2. Interpretive Provision

You have heard testimony that the protection of both collective and individual rights is recognized by First Nations as being a core value necessary to the good governance and well being of their citizens, and that the balancing of these rights is consistent with First Nations traditions and cultures.

You have heard eloquent and moving testimony about the need to ensure that human rights are applied in First Nations in a manner consistent with existing aboriginal and treaty rights, cultures and traditions.

The need to develop a suitable mechanism to achieve the appropriate balance was emphasized by almost all witnesses.

We submit that one way of proceeding is to amend the Bill to include a statement of principle to guide the Commission and the Tribunal in the interpretation of complaints against aboriginal authorities.

Today we are bringing suggested wording:

In relation to a complaint made under the *Canadian Human Rights Act* against an Aboriginal authority, the Act is to be interpreted and applied in a manner that balances individual rights and interests with collective rights and interests.

Such a provision is consistent with sections 15 and 16 of the CHRA.

- Section 15 enables the Commission and Tribunal to take into consideration matters such as the justifiable occupational requirements of a job in considering whether the Act has been contravened.
- For example, denying a job as an airline pilot to a person who has poor vision is discriminatory under the Act, but the discrimination may be justifiable given the requirements of the job.
- In their testimony before you, Professor Larry Chartrand and Ms. Wendy Cornet referred to court and Canadian Human Rights Tribunal decisions regarding First Nations where a balancing of collective and individual rights has already occurred using section 15.
- Section 16 of the Act allows for special programs that discriminate in favor of a particular group if the reason of

the program is to overcome past discrimination.

As a result of sections 15 and 16, the Commission and the Tribunal already have considerable experience in balancing interests in the determination of human rights claims.

To give practical effect to this balancing of collective and individual rights and interests, the Commission is committed to work closely with First Nations and other stakeholders on an ongoing basis.

Dialogue is essential before considering what further instruments, such as regulations, guidelines or policies, or some combination of these, might best help to ensure that the statutory principle is realized in the day to day handling of human rights complaints. Of course we have already begun this dialogue.

3. Transitional Period

Almost all witnesses agreed that time is needed to build the necessary capacity and processes to deal with potential human rights issues in communities.

Some noted that while their communities support human rights they have little understanding or knowledge of how a human rights redress system might work in their communities.

Many times it was emphasized that First Nations communities need time to build the consensus and understanding that is essential to establishing a strong foundation for an effective system for managing and resolving human rights issues.

This testimony has confirmed our conviction that six months is entirely inadequate to do the work required

At a very minimum we believe that 18 months should be allowed before the Act applies to First Nations and preferably significantly longer.

4. Resourcing

Witnesses before you emphasized the need for adequate resources to ensure smooth implementation and ongoing operation of First Nation human rights systems. In their testimony before you, DIAND officials indicated that the government was aware of this need and willing to consider it further, although they did not feel financial matters should be included in the legislation. The Commission understands the concern of First Nations that the resource demands that may result from repeal should not come at the expense of other urgent priorities such as housing, health and education.

As we indicated to you when we appeared previously, the Commission has been in discussion with the government on the resource requirements of the Commission to effectively implement repeal.

However, as of today, no new resources have been allocated to support the Commission's initiatives to engage with First Nations stakeholders or to plan for the implementation of repeal.

Given that resources will not flow until passage of the Bill, we are only able to modestly implement our outreach strategy at this time.

II: The impact of the Repeal – perceptions and reality

Some misconceptions have arisen during your hearings on the possible impacts of the repeal.

For example, a hypothesis has been advanced that a complaint to the Commission could result in significant changes and impacts on First Nations governments. Some have suggested that repeal of section 67 will undermine the whole structure of relations between the government and First Nations, leading to a wholesale dismantling of the Indian Act.

These are difficult issues for the Commission to comment on. I do so with great caution.

The Commission considers each complaint that comes before it on the basis of its statutory mandate, the evidence presented, and the relevant jurisprudence. Nevertheless, in the interest of assisting Committee members in better understanding the statutory mandate of the Commission and how it operates I make these points:

(1) The statutory mandate of the Commission, as important as it is, is relatively narrow. Human rights have many dimensions including a panoply of civil, political, social, cultural, indigenous and many other forms of rights. The work of the Commission focuses primarily on the right to be free from discrimination in employment and the provision of services.

(2) In order for a complaint to proceed it must be based on one or more of 11 specified grounds (sex, age, colour, national or ethnic origin, marital status, family status, sexual orientation, disability, religion and conviction for which a pardon has been granted).

It is not sufficient to simply assert that two individuals or groups have been treated differently or that the quality or level of service received by one group is different to that received by another group. In order for the Commission to proceed with a complaint the link to one of the specific grounds must be demonstrated. I should point out that at the moment "social condition" is not a prohibited form of discrimination.

(3) There are many situations where a person may feel that they have been treated unfairly. They may feel that their human rights, in the broadest sense of that term, have been infringed. Or they may feel that an administrative error has been made. Often, no doubt, they may be justified in these allegations. However, the Commission can only deal with the prohibited forms of discrimination specified in the Act. The Commission is not an ombudsperson, and has no authority to act as one.

(4) While some complaints are lengthy, litigious and costly, they are the exception. Most complaints can be resolved in nine months or less. Twenty-seven percent (27%) of cases are settled and twenty-eight percent (28%) are dismissed because the claim of discrimination is not well founded or are discontinued for other reasons. Thirty-five percent (35%) of cases are referred to alternate means of redress or are not admissible.

Just 10% of cases are referred to the Canadian Human Rights Tribunal and many of these are resolved through mediation.

Because the Commission actively promotes a non-litigious approach to resolving complaints, the need for the involvement of lawyers is minimal.

Many, if not most, human rights situations are resolved before a formal complaint is filed with the Commission.

The Commission actively encourages employers to implement their own internal conflict management systems.

(5) There is some misperception that our mandate is restricted to complaint processing.

One of the key aspects of our implementation strategy is to work with First Nations to build community level redress systems and strengthen existing ones.

In modern conflict management approaches, strong complaint processes are important, yet should be a remedy of last resort.

Our vision is for much more than an internal complaints system. Formal dispute resolution, although important, should be a relatively small part of an overall system that would also embrace prevention and education.

There is such enormous potential here to develop a whole system that starts with a dispute resolution structure

providing multiple options for the resolution of disputes, and is supported by other processes and practices that will shift the emphasis towards the "front end": prevention of discrimination, and education. The core principles to be developed should have as their goal the fostering of a culture that treats conflict resolution as a building block to creating inclusive and productive communities and workplaces.

By establishing integrated human rights and conflict management systems, First Nation citizens will better understand their rights and how to realize them; First Nation governments will better appreciate the rights they are mandated to promote and respect; and all parties will be able to work together to prevent discrimination and resolve human rights complaints.

(6) While it is true that a complaint could result in parts of a federal statute being found to be discriminatory, it is unlikely that such a determination could ever result in the piecemeal dismantling of a legislative regime. The Commission operates remedially, and not as a sword. A government faced by a finding of discrimination has the opportunity to use such a finding as an impetus to examine its procedures or laws and adjust them so as to not conflict with the CHRA.

In closing, I would like to reiterate the Commission's respect for First Nation communities and governments. We respect the right of First Nations to self-government. We respect their legal traditions, customary laws, and systems of dispute resolution. We are committed to working with First Nations to develop a human rights system that fosters and sustains this respect and enhances human rights for all First Nations citizens.

I hope these comments on the hearings will be of assistance to the Committee in completing its deliberations on Bill C-44. My colleagues and I would be pleased to answer your questions.

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